SUPREME COURT, U. S.

In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 740.

BRENDA K. MONROE, *et al.*,

Petitioners,

v.

BOARD OF COMMISSIONERS OF THE CITY OF JACKSON, TENNESSEE, etc.,

Respondents.

BRIEF OF RESPONDENTS.

RUSSELL RICE, SR.,
215 East Main Street,
Jackson, Tennessee 38301,
Attorney for Respondents.

THE GATES LEGAL PUBLISHING CO. CLEVELAND, OHIO—TEL. (216) 621-5647

INDEX.

BRIEF.

I. Counter-Statement of Questions Presented 1

II. Counter-Statement of the Case 2

Racial Breakdown of Jackson's Schools 3

Jackson's Plan of Desegregation 3

Case History 7

III. Summary of Argument 12

IV. Argument 14

a. Relief Sought Opens New Constitutional Field 14

b. Is There a Constitutional Duty to Mix the Races in Public Schools? 18

c. *Jefferson County* Decision 25

Does the Civil Rights Act of 1964 Establish Compulsory Integration as a National Policy? 28

"1966 Guidelines" Violate the Civil Rights Act of 1964 and Is Not Constitutionally Required 35

d. Is the Constitution Subject to Regional Application? 41

e. Compulsory Integration Is Educationally Damaging to Underprivileged Groups and to School Systems Generally 44

V. Conclusion 57

APPENDIX.

(Separately Printed.)

APPENDIX TO BRIEF OF RESPONDENT.

Education in Depressed Areas, by A. Harry Passow 1b

The Neighborhood School, by Archibald B. Shaw 28b

Opinion Poll, October 1963, Editorial From Nation's Schools, Robert M. Cunningham, Jr., Editor 31b

Extract From *"Assimilation in American Life: The Role of Race, Religion and National Origin,"* by Milton Myron Gordon 33b

Desegregation Creates Problems, Too, by I. N. Berlin. Reviewed in Saturday Review June 15, 1963, From *"Integration vs. Segregation,"* Hubert H. Humphrey, Editor 65b

Educational Problems of Segregation and Desegregation, by John H. Fischer, From *"Education in Depressed Areas,"* A. Harry Passow, Editor 71b

The Goals of Integration, by Oscar Handlin 82b

"Slums and Suburbs," by James Bryant Conant 105b

"Hello to Buses, Goodbye to Neighborhood Schools," by Jim Hampton From the National Observer 134b

"A Theory of Urban Education," by Robert E. Mason 141b

De Facto Segregation, a National Education Association Policy 158b

Extracts From Briefs of the United States (pp. 12, 26, 29) Filed in Brown 2 166b

Extract From Brief of Congress of Industrial Organization, Filed by Honorable Arthur Goldberg in Brown 2 (pp. 7 and 8) 167b

Extract From Brief of American Veterans' Committee (pp. 5 and 6) Filed in Brown 2 ..... 169b

Extracts From Oral Argument, Cases 1-5, October Term 1954, Vol. III, April 11-14, 1965 ..... 170b

1966 *Guidelines*—U. S. Dept. of Health, Education and Welfare 188b

TABLE OF CITATIONS.

United States Constitution.

Art. I, Sec. 9, Clause 3 and Sec. 10, Clause 1 ..... 13, 43

Ninth Amendment 13, 28

Tenth Amendment 27, 45

Fourteenth Amendment 2, 12, 13, 15, 17, 18, 26, 27, 28, 36

United States Statutes.

Civil Rights Act of 1964, 78 Stat. 243 ..... 12, 27, 28, 29, 30, 31, 35, 37, 38, 40, 57

Elementary and Secondary Education Act of 1965, 79 Stat. 27 ..... 34, 35, 43

U. S. Administrative Regulations.

Non-discrimination in Federally Assisted Programs, 45 CFR, Part 80, 64 F. R. 12593 38

1966 Guidelines, Office of Education, Department of Health, Education and Welfare 12, 27, 28, 35, 36, 40

Cases Cited.

Avery v. Wichita Falls Ind. Sch. Dist., 241 F. (2) 230 (5th) 25

Bell v. School etc. City of Gary, 324 F. (2) 209 (7th) 1963, cert. den. 377 U. S. 924 (1964) 18, 22, 30, 41

Blatt v. U. S., 305 U. S. 267 ---------- 37

Board of Education of Okla. City Schools v. Dowell, 375 F. (2) 158 (10th) 1967; cert. den. 387 U. S. 931, 1967; 244 F. Supp. 971 (W. D. Okla. 1965) ----------19, 24

Borders v. Rippy, 247 F. (2) 268 (5th) ---------- 25

Boson v. Rippy, 285 F. (2) 43 (5th) ---------- 25

Bowman v. County School Board of Charles City, 382 F. (2) 326 (4th), 1967, concurring opinion ---- 15

Bradley v. School Board City of Richmond, 345 F. (2) 210 (4th), 1965; 382 U. S. 103 (1965) --8, 18, 22, 23

Brown v. Topeka School Board, 347 U. S. 483; 349 U. S. 294. Also 139 F. Supp. 468 ----------
--1, 2, 5, 11, 12, 14, 16, 17, 20, 21, 22, 23, 24, 41, 57, 59

Calhoun v. Latimer, 377 U. S. 263 (1964) ---------- 22

Civil Aeronautics Board v. Delta, 367 U. S. 316 ---- 39

Clark v. Board of Education of Little Rock, 374 F. (2) 569 (8th), 1966 ----------20, 25

Cohen v. Public Housing Adm., 257 F. (2) 73 (5th) 25

Cooper v. Aaron, 358 U. S. 1 (1958) ---------- 21

Deal v. Cincinnati (6th Circuit), 369 F. (2) 55, *cert. den.* OT 1967 ---------- 41

Deal v. Cincinnati Bd. of Education, 389 U. S. 847 (1967), cert. den. (O. T. 1967) ---------- 22

Downs v. Kansas City, 336 F. (2) 988 (10th), 1964, cert. den. 380 U. S. 914 (1965) ----------18, 22, 24

Evans v. Ennis, 281 F. (2) 385 (3d), 1960 -------- 19

Evers v. Jackson Mun. Sep. Sch. Dist., 328 F. (2) 408 (5th) ---------- 25

Ex parte Virginia, 100 U. S. 46, 25 L. Ed. 676 ------ 27

Goss v. Board of Education of Knoxville, 373 U. S. 683 ---------- 5, 6, 21, 22, 23

Helvering v. Edison, 133 F. (2) 575 ---------- 37

Henry v. Clarksdale Mun. Sep. Sch. Dist., No. 23255 in 5th Cir. Argued May 24, 1966, not decided. On appeal from Northern District of Mississippi. (*Race Relations Law Reporter*, Vol. II, No. 2, Summer 1966, p. 719.) Not reported otherwise 42

Jackson v. Marvell Sch. Dist.—Not Yet Reported—8th Cir. ---------- 25

Kelley v. Altheimer Ark. Publ Sch. Dist., 378 F. (2) 483 (8th), 1967 ---------- 23

Kelley v. Board of Education of Nashville, 270 F. (2) 209 (6th), cert. den. 361 U. S. 924 ---------- 18, 22

Kier v. County School Board of Augusta County, 249 F. Supp. 239 (W. D. Virginia, 1966) ---------- 23

Lockett v. Board of Education, 342 F. (2) 225 (5th), 1965 ---------- 19

Mahler v. Eby, 264 U. S. 32 ---------- 39

Monroe v. Bd. of Commissioners of City of Jackson, 244 F. Supp. 353 (lower court decision in this case)

Monroe v. Bd. of Comm. of City of Jackson, 221 F. Supp. 968 (lower court decision in this case)

National Labor Rel. Bd. v. Prettyman, 117 F. (2) 786 (6th), 1941 ---------- 39

Plessy v. Ferguson, 163 U. S. 537 ---------- 41

Raney v. Board of Education of Gould School Dist., 381 F. (2) 252 (8th), 1967 ---------- 20

Rogers v. Paul, et al., 382 U. S. 198, 1965 ---------- 8

Springfield School Comm. v. Barksdale, 348 F. (2) 261 (1st), 1965 ---------- 18

Stell v. Savannah-Chatham County Bd. of Ed., 333 F. (2) 55 (5th), cert. den. 379 U. S. 933 (1964) ---------- 15, 18, 25

Taylor v. Board of Education of New Rochelle, 294 F. (2) 36 (2d) 1961; cert. den. 368 U. S. 940 (1961) ---------- 19

United States v. Bennett, 186 F. (2) 407 ---------- 37

United States v. Cruikshank, 92 U. S. 555; 23 L. Ed. 588 ---------- 27

United States v. Jefferson County Bd. of Ed., 372 F. (2) 836 (5th), 1966; 380 F. (2) 385 (affmd., en banc), cert. den. 36 U. S. L. W. 3144 (10-9-67) ---- 12, 13, 15, 17, 19, 25, 26, 27, 28, 30, 35, 36, 40, 41

United States. v. Miss. Chem. Corp., 326 F. (2d) 569 (5th), 1966 ---------- 37

United States v. Patrick, 54 F. 338 ---------- 27

Wanner v. County Board of Arlington County, 357 F. (2) 452 (4th), 1966 ---------- 20

Wichita v. Public Utilities Comm., 260 U. S. 48 ---- 39

Yarbrough v. Hulbert-West Memphis School Dist., 380 F. (2) 962 (8th), 1967 ---------- 20

Tennessee Constitution.

Art. II, Sec. 12 ---------- 14

Tennessee Statutes.

Tennessee Code Annotated (1955), Sections 49-3701, 49-3702, 49-3703 ---------- 14

General Reference Books.

2 *Am. Jur.* (2) 168, Sec. 354 ---------- 38

Other Authorities.

Education in Depressed Areas, by A. Harry Passow -- 46

The Neighborhood School, by Archibald B. Shaw --- 47

Opinion Poll, October 1963, Editorial from Nation's Schools, Robert M. Cunningham, Jr., Editor ---- 47

Extract from "*Assimilation in American Life: The Role of Race, Religion and National Origin*," by Milton Myron Gordon ---------- 47

Desegregation Creates Problems, Too, by I. N. Berlin. Reviewed in Saturday Review, June 15, 1963, from "*Integration v. Segregation*," Hubert H. Humphrey, Editor ---------- 48

Educational Problems of Segregation and Desegregation, by John H. Fischer, from "*Education in Depressed Areas*," A. Harry Passow, Editor ---- 48

The Goals of Integration, by Oscar Handlin ------- 48

"*Slums and Suburbs*," by James Bryant Conant -- 43, 48

"*Hello to Buses, Goodbye to Neighborhood Schools*," by Jim Hampton ---------- 57

"*A Theory for Urban Education*," by Robert E. Mason 47

De Facto Segregation, a National Education Association Policy ---------- 45

In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 740.

BRENDA K. MONROE, *et al.*,

Petitioners,

v.

BOARD OF COMMISSIONERS OF THE CITY OF JACKSON, TENNESSEE, etc.,

Respondents.

BRIEF OF RESPONDENTS.

I.

COUNTER-STATEMENT OF QUESTIONS PRESENTED.

I. The City of Jackson School System is operating in a Constitutional manner within the meaning of *Brown v. Topeka School Board*, 347 U. S. 483; 349 U. S. 294.

The Petitioners say the answer is "No."

The Respondents and the lower Courts say the answer is "Yes."

IIA. Does the Fourteenth Amendment to the Constitution of the United States require compulsory racial mixing in public schools in the United States?

The Petitioners say the answer is "Yes."

The Respondents and the lower Courts say the answer is "No."

IIB. Does the Fourteenth Amendment require the imposition of State imposed integration to eliminate racial imbalance in schools—

a. in all States?

b. in only those States having segregation statutes in effect at the time of the decisions of this Court in *Brown v. School Board* (347 U. S. 483; 349 U. S. 294)?

The Petitioners say the answer is "Yes" to IIB(b).

The Respondents and the lower Courts say the answer is "No" to both alternatives.

IIC. Does the Fourteenth Amendment require State imposed integration to eliminate in public schools separation of races resulting from (a) neighborhood racial patterns, sometimes referred to as "de facto" segregation, or (b) from voluntary transfers under a free transfer plan fairly administered without regard to race?

The Petitioners say the answer is "Yes."

The Respondents and the lower Courts say the answer is "No."

II.

COUNTER-STATEMENT OF THE CASE.

The Petitioners will be referred to as Plaintiffs and the Respondents as Defendants hereafter in this brief.

The City of Jackson, Tennessee is a small Tennessee City (40,000) with a population division between white and Negro of approximately 70% white and 30% Negro. The school population is divided approximately 60% white and 40% Negro. The School System consists of eight elementary schools (1-6), three Junior High Schools (7-9) and two High Schools (10-12) (R. 34a, 35a). The District embraces the City Limits and is administered by the Board of Commissioners of the City of Jackson.

The record in this case is nearly three years old. This defendant desires to set forth at this point a current report on the progress of desegregation in Jackson, Tennessee

schools so the Court will have this advantage while reading the remainder of this brief.

1967-1968 RACIAL BREAKDOWN OF STUDENTS ATTENDING JACKSON CITY SCHOOLS [1]

Elementary Schools	White	Approx. %	Negro	Approx. %
Alexander School	522	76%	160	24%
Highland Park	778	99%	3	1%
Parkview	474	80%	112	20%
Lincoln	–0–	0	537	100%
South Jackson	–0–	0	475	100%
Washington-Douglass	–0–	0	413	100%
West Jackson	346	79%	94	21%
Whitehall	324	81%	72	18%
Junior High				
Tigrett Junior High	812	99%	7	1%
Jackson Junior High	349	72%	135	28%
Merry Junior High	–0–	0	640	100%
High Schools				
Jackson High	823	99%	30	1%
Merry High	–0–	0	545	100%

It is likewise considered desirable, early in this brief, to give the Court a complete picture of the Jackson, Tennessee Desegregation Plan in effect since August 11, 1965.

JACKSON, TENNESSEE PLAN OF DESEGREGATION.[2]

The essence of the plan under which the City of Jackson has operated its School System since September 1965, as modified by the District Court on August 11, 1965 and approved by the Court of Appeals (6th) is as follows:

---

[1] Report to U. S. Office of Education 1967.

[2] Record references to Jackson's plan include original plan and Court modifications thereof. (R. 29a, 42a-44a; 45a-50a; 392a-396a; 402a-407a.)

Every school in the city has established for it a unitary geographic zone, based on appropriate factors without regard to race. The Junior High School zones were created on the basis of educational factors, using natural boundaries such as thoroughfares and railroads. While the Plaintiffs charge gerrymandering of the Junior High zoning boundaries there is no evidence whatever to support such charge. Both the Trial Court and the Sixth Circuit have considered the gerrymandering charge and rejected it. It is a reasonable assumption that Plaintiffs' experts would have objected to any boundary. This defendant, at any event, does not believe this Court granted certiorari in this case just to look at a boundary line on a map which has already been approved by the District Court and the Sixth Circuit.

Every student, each year, is required to personally and physically enter the appropriate school building located in the unitary zone in which he lives and register in that school. This is compulsory. It is affirmative state action. Every student, white or Negro, has the absolute, unqualified right to attend the school in the zone in which he lives and if the student does nothing else on a voluntary basis that is the school the student *must* attend.

Any student, white or Negro, for reasons satisfactory to such student or parents, may apply for a transfer to any school zone in the system and the transfer is granted, except in the single situation where the school in such zone is at maximum capacity with children who live in such zone. This free transfer works in any racial direction and is administered without regard to race. If a Negro child wishes to transfer from the school located in the zone in which he lives to a predominantly white school or to a predominantly Negro school, regardless of the racial composition of the school in which registered, he or she

may do so. If a white child wishes to transfer, he has the same right. This is uniformly applied without regard to race.

The State action described above places every student physically within the school of the zone in which the student lives. That is where the student must attend as far as State action is concerned and that is where compulsion ends.

Any action to change that situation must come from the student and his or her parents. Every student, white or Negro, has the identical non-discriminatory right.

The voluntary, non-discriminatory exercise of the unrestricted transfer right within the City of Jackson schools has resulted in one out of six Negro children attending integrated schools while some schools remain all-Negro. There are no all-white schools remaining. While to this extent some *separation*[3] remains, it is not state imposed, it is not as a result of discrimination and it is not inevitably so.

> "This is not to say that appropriate transfer provisions, upon the parents request, consistent with sound school administration and not based upon any state-imposed racial conditions would fall. Likewise, we would have a different case here if the transfer provisions were unrestricted, allowing transfers to or from any school regardless of the race of the majority therein."

The above language is quoted from the decision of this Court in *Goss v. Board of Education*, 373 U. S. 683 and

---

[3] The question of *separation* of the races as opposed to *segregation* of the races was before this Court at the time of the argument in *Brown 2*. (Appendix p. 170b.) It was clearly recognized in the discussion between the Court and Counsel that all-Negro schools could conceivably result even with the condemned state imposed segregation based on race completely eliminated.

is the foundation of the Jackson Transfer Plan, both the original plan and the plan acted on since the District Court decision of August 11, 1965. The District Court faulted the *application* of the transfer plan in the August 11, 1965 decision simply because *every* transfer application submitted by Negro students was not granted, nor of white students either, on grounds other than race. *Since August 11, 1965 every Negro student asking transfer has received approval of such transfer.* The Plaintiff cannot stand before this Court or the District Court *any* Negro student who has been denied a transfer since August 11, 1965.

In *Goss* this Court established the rule that

> "But no official transfer plan or provision of which racial segregation is the *inevitable* consequence may stand under the Fourteenth Amendment." (Italics supplied.)

Is segregation the "inevitable" consequence of the Jackson plan? Obviously it is not. Under the Jackson plan every Negro child in the City could, if they chose, transfer into integrated schools. Or every Negro child could transfer into all-Negro schools. The same option is available to white children. There is absolutely nothing *inevitable* about the plan.

As a practical matter in 1966-67 school year 475 Negro children attended integrated schools out of 3205 Negro children in the system.[4] In 1967-68 school year integration had progressed to 615 out of 3228 attending integrated classes.[5] It is probable that this progressive integration will continue until all-Negro schools disappear. This method of desegregation will eventually result in total integration as a by-product. Far more importantly,

---

[4] 1966 Report to U. S. Office of Education.

[5] 1967 Report to U. S. Office of Education.

the *quality* of education in the Jackson School System receives minimal damage thereby. Everyone benefits from quality education.

Some authorities judge a plan by the question, "Does it Work?" This plan will work and is working.

CASE HISTORY.

The Jackson schools voluntarily began desegregation in 1961 (R. 11a), admittedly on a very limited basis, but a beginning was made. No suit had been filed directing this desegregation and in 1963, after filing of suit, the District Court for the Western District of Tennessee (Hon. Bailey Brown, District Judge), on Constitutional grounds only, granted summary judgment (R. 27a) requiring desegregation of the system under a plan to be submitted by the Board.

The School Board submitted a plan of desegregation to the District Court (R. 29a), including zones for elementary schools, which plan after modification as to time, was approved by the District Court (R. 33a). This decision was not appealed by Plaintiffs and was applied to the 1963-64 school year.

The Trial Court found no substantial difference between the quantity and quality of the buildings, equipment and curricula of the Jackson schools (R. 36a).

In September 1964 the Plaintiffs by *Motion for Further Relief* (R. 51a) attacked the elementary zones, already once approved by the District Court, as being gerrymandered racially and the Court allowed them a further hearing. A pre-trial hearing, amended motion, and examination of school records caused a delay of several months. This matter did not reach a hearing until spring of 1965 and in the meantime the School Board filed suggested Junior High School Zoning Maps. (R. 104a.) The Junior

High maps were likewise objected to (R. 106a) and the two propositions were consolidated for hearing.

On July 30, 1965 the District Court entered its Memorandum Decision (R. 365a) (Order dated August 11, 1965 (R. 390a)) which order (1) allowed certain changes to elementary zoning maps as suggested by the School Board (R. 375a), (2) made certain minor additional changes to elementary maps (R. 377a-378a), and (3) approved the Junior High School Zoning Maps (R. 378a-379a). (4) This order likewise found the School Board deficient in applying its transfer provisions under the plan (R. 372a), and ordered certain changes therein. In this same order the District Court (5) for the first time directed the School Board to end its policy of assigning only white teachers to predominantly white schools and of assigning only Negro teachers to predominantly Negro schools and provided certain conditions to be met (R. 380a-384a inc.). (6) The plan was likewise accelerated (R. 380a). All grades are now desegregated in the City of Jackson School System.

This is the order which was appealed to the United States Court of Appeals for the Sixth Circuit.

The Court of Appeals upheld the District Court in all respects except on the question of faculty and remanded the question to the District Court for further action in line with *Bradley vs. School Board*, 382 U. S. 103 (1965); *Rogers vs. Paul, et al.*, 382 U. S. 198 (1965) which decisions were published *after* the District Court delivered its opinion in this case (R. 397a et seq.).

While the District Court order of August 11, 1965 has been applied fully in the School years 1965-66, 1966-67 and 1967-68, there is nothing in this record to reflect the results of such application within the system. Significantly, no further attacks on the plan or its application

are now pending at the District Court or Appeals Court level.

In the District Court on the question of Junior High School Zoning, the Defendant offered its Superintendent of Schools C. J. Huckaba who introduced a zoning map creating three Junior High School Districts for the City of Jackson (Exhibit 10) (R. 141a-142a). Superintendent Huckaba testified that the Junior High School zones were prepared by him giving consideration to natural features, such as terrain, throughfares and railroads (R. 141a-135a), school load, teacher load, classroom load, proximity of school to other schools, location of the children to be served (R. 132a).

On a large map, Exhibit 11 (R. 141a-142a), the Junior High lines are indicated in red (R. 142a); the blue dots upon Exhibit 11 represent the residence of a white student and those dots in red indicate the residence of a Negro student as evidenced by a survey of school attendance, grades 1-12, and a preschool survey of ages 1-5 (R. 128a-129a-130a-131a); Mr. Huckaba testified as to capacity class load, teacher load in all schools (R. 133a-82a-89a); Mr. Huckaba denied racial considerations in preparation of zones (R. 206a).

The Plaintiffs offered witness Roger W. Bardwell who qualified himself as an educator (R. 207a) and stated that he is the school superintendent of School District 59, Elkgrove Township, Illinois, consisting of approximately 6200 students (R. 207a); that he in company with Mr. Merle Herman were employed by the N.A.A.C.P. (R. 224a) to make a study of the Jackson School Plan for desegregation (R. 209a); that they prepared maps for use which map shows the residence of only those students attending particular schools (R. 215a-216a), that such map did not show the residence of every student living within the respective

school districts (R. 227a); that he cannot distinguish on his maps between transfer students, students living in the area, or students allowed to remain in such school under the provision in the 1963 Court order allowing students attending a particular school to continue in such school until graduated regardless of residence (R. 228a-229a); that his exhibits 12-21 (R. 211a-_____) are not the same thing as is shown by Plaintiff's Exhibit No. 11 (R. 227a), that he could not have zoned the City Schools of Jackson in accordance with the desegregation plan and know with any degree of accuracy how many children would wind up in any school (R. 229a); that districting is a trial and error proposition (R. 229a); that in districting a school in an existing system it is necessary to take the schools where they are in creating districts (R. 231a); that he is not recommending circular districting of Jackson's schools as shown on his Exhibits 12-21 (R. 231a), that he was not asked to present a plan for the districting of Jackson's schools, that it would be presumptuous to do so, that he is not familiar with the situation, that he is not familiar enough to say the line should go down this street or that street (R. 233a); that he has examined school load, classroom load, capacity enrollment, etc. for city schools and that they are fairly balanced (R. 234a); that the school district of which he is superintendent has eleven elementary schools and two Junior High Schools sharing a high school; that his community has no Negro population at all; that he has had no experience in trying to integrate an all-white school district or in desegregating one that has been segregated (R. 235a); that all of his conclusions are drawn from the Exhibits 12-21 and not from his study of where children actually live over the entire community (R. 236a); that his conclusions were drawn not only on his educational experience but on what he understood the

law to be (R. 239a), that districting is for the local people (R. 240a).

The Plaintiffs offered Witness Merle G. Herman who qualified himself as an expert in education serving as Assistant Superintendent in the Villa Park School District, a district in Illinois of approximately 6200 students (R. 246a-247a). This witness testified that he favors what is known as a feeder system of zoning (R. 247a-248a-251a-254a), that zoning in the City of Jackson "did not facilitate integration" (R. 254a); that the school district of this witness is a part of greater Chicago as is Dr. Bardwell's district, that these districts receive State aid (R. 262a) and are a part of the overall system (R. 263a), that the districts transfer students between themselves (R. 263a), that in his district of Villa Park there are ten or twelve Negro students (R. 263a); when asked what steps he was taking in his district to correct the racial imbalance of ten Negroes out of 6800 students, his answer was that he plans to do something in the future (R. 265a); that as superintendent he has policy-making powers (R. 268a), that no objective move, actually concrete move, has been made to accomplish greater integration in his district (R. 269a); that he examined the Jackson school load, teacher load, classroom load and found them to be good (R. 276a); that districting is a matter of opinion (R. 276a), that his exhibits do not in any way set up a plan for the Jackson districts (R. 279a); that he considers integration necessary (R. 282a). This witness was asked to suggest a zoning plan for the Junior High Schools in the City of Jackson (R. 287a-288a) and he declined to do so (R. 288a-289a-290a-291a-292a-293a).

This case, therefore, is not a desegregation case at all within the plain meaning of the Brown decisions (*Brown vs. Board of Education*, 347 U. S. 483; (2) 349 U. S. 294).

This is now a case wherein these plaintiffs are seeking on Constitutional grounds (Fourteenth Amendment) an order compelling school boards to compulsorily mix its Negro children, because they are Negro, with its white children, because they are white and vice versa. Instead of eliminating compulsory state action based on race as sought in the District Court, it is now sought by this appeal to establish compulsory state action, solely based on race, as the law of the land, i.e. compulsory integration.

III.
SUMMARY OF ARGUMENT.
(40-2-(f)).

a. This appeal opens a new Constitutional question in that the relief sought is compulsory integration. The only basis asserted is that desegregation does not produce enough mixing of races independent of the question of discrimination. This will substitute for unconstitutional segregation based on race equally unconstitutional assignment based on no other factor except race. This is not within the scope of *Brown* which condemned only discrimination or otherwise required by the Constitution.

b. There is no Constitutional duty to mix races within schools and *Brown* did not so state. When discrimination is eliminated the Constitution is satisfied.

c. The decision of the Fifth Circuit in *U. S. v. Jefferson County*, 372 F. (2) 836, the only decision of note holding that compulsory integration is required is premised by its own terms on the legal basis that (1) the Constitution of the United States requires compliance with the provisions of the Guidelines of the Office of Education, Department of Health, Education and Welfare and (2) the Civil Rights Act of 1964 establishes a National Policy command-

ing integration. Defendants contend that both of these points are without legal foundation and that therefore *Jefferson County* by its own terms must fail. Further, that *Jefferson County* denies to Negro parents right-of-decision concerning their own children, rights guaranteed by the Ninth and Fourteenth Amendments to the Constitution. It is further contended that the Civil Rights Act of 1964 not only does not command integration, it contains prohibition against any such requirements. It is likewise contended that the *Guidelines* are not Constitutionally required and that same are violative of the Civil Rights Act of 1964.

d. The defendants position is that there is no legal, equitable or rational basis for trying to distinguish between "de jure" and "de facto" segregation. The only purpose for such effort is to limit the application of the alleged duty to compulsorily integrate to the South, in spite of the unquestionable fact all other areas abound in segregation by whatever name it may be identified. It is contended that such regional application of a constitutional duty is un-American, violates equal protection under the Constitution and the proscriptions of Art. I, Section 9, Clause 3 and Section 10, Clause 1 of the Constitution and is a question-begging distinction unworthy of the Federal Judiciary.

e. Respectable *educational* authority reflects clearly that compulsory integration damages both the individual, especially the underprivileged, and the school systems and does not produce real good for anyone. All quoted authorities support elimination of discrimination as in *Brown* but consider the schools should not be asked to do more in the struggle involving Civil Rights, poverty and moral and mental attitudes existing nationwide. These experts in education contend the job of the school to aid

in the fight against such national problems can best be performed by concentrated educational enrichment, especially in depressed areas. Compulsory integration will be a fleeting victory as experience across the country shows compulsory integration is followed by immediate residence relocation, therefore serving no purpose.

IV.

ARGUMENT.

a. RELIEF SOUGHT OPENS NEW CONSTITUTIONAL FIELD.

A proper argument of this matter requires, first of all, a true understanding of the thrust of the appeal. The vehicle in which this matter reaches this Court is a standard suit to require desegregation of a school system under the interpretation of the Fourteenth Amendment first expressed in the *Brown* cases (*Brown vs. Board of Education*, 347 U. S. 483; 349 U. S. 294). The basic relief sought in the original complaint in the District Court is as follows:

> "The Court enter a judgment or decree declaring that the custom, policy, practice or usage of defendants in maintaining and/or operating *compulsory* racially segregated public school system in and for the City of Jackson (and the County of Madison) State of Tennessee, and *in excluding plaintiff(s) and other persons similarly situated from the Jackson Senior High School and Alexander Elementary School, or any other public schools, institutions or facilities maintained and/or operated by defendant(s)*, City Board of Education (and County Board of Education) *solely because of race or color*, pursuant to the above quoted portions of Article II, Section 12 of the Constitution of Tennessee, Sections 49-3701, 49-3702 and 49-3703 of the Tennessee Code Annotated, 1955, and any other law, custom, policy, practice and usage,

violates the Fourteenth Amendment of the Constitution of the United States and is therefore unconstitutional and void." (Emphasis supplied.)

It was this relief which was summarily allowed by the District Court and this lawsuit proceeded under such banner until 1965 when the argument of "affirmative duty to disestablish segregation" appeared in the District Court. When this argument is so eloquently advanced, coupled with the proof offered of ways to obtain "greater integration" in the Junior High Schools, the lawsuit has changed banners and is no longer a "desegregation" proceeding. The appeal before the Sixth Circuit and now this Court is the culmination of nationwide efforts by the real plaintiff in all of these school proceedings to have the Federal Courts command "compulsory integration." The phrase "affirmative duty to disestablish segregation" has been especially coined for the hoped-for purpose of changing by semantics a *prohibition* into a *positive command.*

The Fourteenth Amendment prohibits, it does not command. Prohibiting state imposed segregation is one thing, commanding state imposed integration is an entirely different matter.

Federal Courts have traditionally distinguished between desegregation and integration.[6]

The Plaintiffs in this case are proceeding in the hope this Court will determine that the "end justifies the means," and the exercise in semantics set out above is an ingenious but transparent effort to provide this Court

---

[6] *e.g., Bowman v. County School Bd. of Charles City Co.*, 382 F. 2d 326, 336 (4th Cir. 1967) (concurring opinion); *Stell v. Savannah-Chatham Co. Bd. of Ed.*, 333 F. 2d 55, 59 (n. 2) (5th Cir. 1964), cert. denied, 379 U. S. 933 (1964); contra, *United States vs. Jefferson Co. Bd. of Ed.*, 372 F. 2d 836 (5th Cir. 1966), aff'd en banc, 380 F. 2d 385, 389 (n. 2), cert. denied, 36 U. S. L. W. 3144 (U. S. 10-9-1967).

blinders with which to look the other way and declare *compulsory integration* a constitutional requirement.

The relief sought in the lower Court was an end to actions taken "solely because of race or color." The relief sought by this appeal is *compulsory assignment* of students based on *no other factor except race*. This presents a new Constitutional question.

This Defendant has been guided by principles laid down by this Court, as interpreted from time to time by the Circuit Courts of Appeals, and especially by the Sixth Circuit. The expressions by this Court are not many but are clear to this Defendant. The *Brown* cases clearly hold that *discrimination* is unconstitutional; that *State imposed* segregation based on race in schools is discriminatory and, therefore, is unconstitutional. That is what this Court set forth and that is all.

Mr. Chief Justice Warren clearly and succinctly states this in *Brown 2:*

> "The opinions of that date, declaring the fundamental principle that racial *discrimination* in public education is unconstitutional * * *." (p. 298.) (Italics supplied.)

and establishes beyond question that the prohibited act is *discrimination.*

Further, still quoting:

> "All provisions of federal, state or local law requiring or permitting such *discrimination* must yield to this principle." p. 298. (Italics supplied.)

This is not casual language as emphasized by Mr. Justice Frankfurter.

> "Mr. Justice Frankfurter: I am sure you will agree in this kind of litigation it is of the utmost importance to use language of fastidious accuracy?"

Mr. Marshall: Absolutely, we agree with you fully." (p. 126, Vol. 3, Oral Arguments, App, p. 187b).

This Court in *Brown* did not condemn *separation*. "Segregation with sanction of law" is condemned. (See discussion of Point 2 below (p. 18).)

The desegregation required by the *Brown* decisions is authorized only under the Fourteenth Amendment to the Constitution:

> "* * * nor shall any state deprive any person of life, liberty or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws * * *
>
> "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

The Plaintiffs in their petition for certiorari have limited this appeal by the statement contained on page 5 in said petition as follows:

> "Plaintiffs seek to have reviewed on certiorari the specific rule on gerrymandering of Junior High School zones in the Jackson City School System, which was based on the general legal premises of lack of an affirmative obligation to disestablish segregation of students."

The Plaintiffs rely primarily on the decision of the Fifth Circuit in *U. S. v. Jefferson County*, 372 F. (2) 836; 380 F. (2) 385, cert. den. O. T. 1967. Therefore, the actual position of the Plaintiffs in this appeal is that *compulsory integration* is constitutionally required, with three major points in support thereof:

1. That the Civil Rights Act of 1964 adopted by the Congress of the United States constitutes a National Policy demanding compulsory integration and therefore amounts

to "enforcement" of the Fourteenth Amendment under Section 5 thereof.

2. That the Constitution (Fourteenth Amendment) commands affirmative action by a school board to bring about the intermingling of races within public schools, i.e. compulsory integration.

3. That every plan for the administration of public schools, such as by geographic zoning, wherein compulsory segregation and discrimination is totally eliminated must be measured as to its constitutionality by the extent to which it results in actual integration or physical mixing of the races.

This defendant challenges the legal validity of all three propositions.

b. IS THERE A CONSTITUTIONAL DUTY TO MIX THE RACES IN PUBLIC SCHOOLS?

No decisions of this Court, or the circuit courts, other than perhaps the Fifth Circuit, impose any duty to bring about a mixing of the races in public schools by compulsory state action. With near unanimity the Circuits have consistently held that the only affirmative obligation is to "desegregate" the schools by eliminating compulsory assignments on the basis solely of race and that neither the Constitution nor *Brown* require integration; that they only prohibit state-enforced segregation.[7]

[7] *Springfield School Comm. v. Barksdale*, 348 F. 2d 261, 264 (1st Cir. 1965); *Bradley v. School Board of City of Richmond*, 345 F. 2d 210, 315-19 (4th Cir. 1965), *vacated and remanded on other grounds*, 382 U. S. 103 (1965); *Kelley v. Board of Education of Nashville*, 270 F. 2d 209, 226 (6th Cir.), *cert. den.* 361 U. S. 924 (1959); *Stell v. Savannah etc.*, 333 F (2) 59; *Bell v. School City of Gary*, 324 F. 2d 209, 213 (7th Cir. 1963), *cert. den.* 377 U. S. 924 (1964); *Downs v. Board of Education of Kansas City*, 336 F. 2d 988, 998 (10th Cir. 1964), *cert. den.* 380 U. S.

(Continued on following page)

For this reason, the same courts have consistently held that any plan which provides a "reasonable and conscious opportunity" to students to attend the school they want and eliminated bi-racial attendance zones complies, in itself, with the constitutional mandate without any further or different requirements in the nature of compelled assignments designed to promote or result in "integration." See *Lockett v. Board of Education*, 342 F. (2) 225, 228-29 (5th Cir. 1965).[8]

Decisions of two other circuits are also in accord although they do not contain express statements. In *Taylor v. Board of Education of New Rochelle*, 294 F. (2) 36 (2nd Cir. 1961), *cert. denied*, 368 U. S. 940 (1961), it was found that the school board "had *deliberately* created and maintained a racially segregated school" (294 F. (2) at 38), and it is significant, we think, that the relief decreed and approved was that children attending this school "shall be *permitted* to register and enroll in any other public elementary school in the New Rochelle Public School System" (294 F. (2) at 490). And in *Evans v. Ennis*, 281 F. (2) 385 (3rd Cir. 1960), although the court stated that the school system "must proceed to *integration* with all deliberate speed" (281 F. (2) at 394), it is evident from the opinion that the plan was based upon voluntary choice (the opinion stating elsewhere that in future years "more and more Negro children will *seek integration* into the

---

(Continued from preceding page)

914 (1965). (The holding in *Board of Ed. of Okla. City Schools v. Dowell*, 375 F. 2d 158 (10th Cir. 1967), *cert. den.*, 387 U. S. 931 (1967) was premised upon a finding of bad faith on the part of the school board in implementing its desegregation plan. See *Dowell v. School Bd. of Okla. City*, 244 F. Supp. 971, 981 (W. D. Okla. 1965).)

[8] Overruled in *United States v. Jefferson Co. Board of Ed.*, 380 F. (2) at 390. (This case will be treated specially hereafter. See page 25 this brief under heading "*Jefferson County.*")

public schools" (281 F. (2) at 391) and that the term "integration" was used as the term "desegregation" ordinarily is employed. The Eighth Circuit has not adopted the views of the Fifth Circuit.[9]

To be distinguished, of course, are decisions holding that a school board may voluntarily take steps to adjust racial imbalance.[10]

The decisions of this Court also make it plain that the condemned action is *discrimination* and that the only duty imposed by the Constitution is that of "desegregation," *i.e.*, the elimination of legally enforced segregation—and not "integration." This has consistently been the interpretation by the Fourth, Sixth and Eighth Circuits of the basic *Brown* decisions. And this, we submit, is the only conclusion which can be drawn from the language in *Brown*. In *Brown I*, this Court decided only that "segregation of children in public schools *solely* on the basis of race" was unconstitutional (347 U. S. at 493, 494).[11]

It was "(s)egregation *with the sanction of law*" that was found to have a tendency to retard the educational development of children (347 U. S. at 494).

In *Brown* 2, this Court significantly spoke in terms of the "*admission*"—not assignment—of students "to public schools as soon as practicable on a non-discrimina-

---

[9] *Yarbrough v. Hulbert-West Memphis School Dist.*, 380 F. (2) 962 (8th Cir. 1967); *Clark v. Board of Education of Little Rock*, 374 F. (2) 569 (8th Cir. 1966). *Cf. Raney v. Board of Education of Gould School Dist.*, 381 F. (2) 252 (8th Cir. 1967), also before this Court.

[10] See, e.g., *Wanner v. County School Bd. of Arlington County*, 357 F. (2) 452 (4th Cir. 1966).

[11] Mr. Thurgood Marshall: "The real question involved is as to whether or not the states involved as of now, today, do or do not have power to use race and race alone for the basis of segregation * * *." (p. 33, Vol. 2, Cases 1-5 U. S. Supreme Court, Oct. Term 1954 (12-(7-9)-53). *Gebhart v. Belton.*)

tory basis." 349 U. S. at 300. Indeed, the opinion indicates even that this Court considered the proper remedy to be freedom of choice. The questions propounded and considered by the Court respecting the proper method of achieving desegregation in accordance with its earlier decision in *Brown I* were (349 U. S. at 298, n. 2):

> 4. Assuming it is decided that segregating in public schools violated the Fourteenth Amendment (a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should *forthwith* be *admitted to schools of their choice*, or (b) may this Court in the exercise of its *equity* powers permit an effective *gradual adjustment* to be brought about from existing segregated systems to a system not based on color distinctions? (Emphasis added.)

Cooper v. Aaron, 358 U. S. 1 (1958), similarly spoke in terms of "the duty of desegregation" as requiring the "admission"—not the compulsory assignment—of "qualified Negro children." 358 U. S. at 7. The nature of the affirmative duty thus imposed upon schools was made crystal clear:

> "State authorities were thus duty bound to devote every effort toward *initiating desegregation* and bringing about the *elimination of racial discrimination* in the public school system."

It was not a duty to take affirmative steps to see that any particular number of Negro students actually *integrated*—or that all-Negro schools were eliminated as is argued here by Plaintiffs. Except for cases dealing with speed of desegregation and one case, *Goss v. Board of Education of Knoxville*, 373 U. S. 683 involving a provision permitting *white* students to transfer on the basis of race so as to nullify integration, this Court has taken no opportunity since *Cooper v. Aaron* to state positively the nature of

plan provisions which would be deemed to be adequate compliance within *Brown 2*. This Court also has had numerous opportunities to review decisions of the lower courts holding that the Fourteenth Amendment only prohibits state-enforced segregation but does not require affirmative "integration," but has declined.[12] Indeed, on two occasions—in *Goss* and by implication in *Calhoun v. Latimer*—the Court has approved freedom of choice plans.

The Plaintiff's argument in the present proceeding contemplates a requirement of compulsory assignments to achieve racial mixing or balance, if necessary. This represents a radical departure from constitutional principles established by prior decisions of this Court and other Federal Courts. The Plaintiff is seeking a *replacement* of freedom of choice or transfer with a system of compelled assignments—a replacement which the Plaintiff contends is *constitutionally required*.

The Plaintiff's position is sustainable only if the Fourteenth Amendment *requires* Negro children to attend schools with whites and *requires* that they may be made to do so by compulsory racial assignments. This Court and every other Federal appellate court case, except one, have held that this is *not* required by the Fourteenth Amendment. In view of the Plaintiff's basic premise that the existence of schools which are all-Negro compels the conclusion that Jackson's Plan is constitutionally inadequate, it is appropriate to reiterate that the basic rationale in the decisions of the courts for the acceptance of such

---

[12] Among them are *Calhoun v. Latimer*, 377 U. S. 263, 264 (1964); *Bradley v. School Bd. of City of Richmond*, 382 U. S. 103, 105 (1965); *Downs v. Board of Education of Kansas City*, 380 U. S. 914 (1965); *Bell v. School City of Gary*, 377 U. S. 924 (1964); *Kelley v. Board of Education of Nashville*, 361 U. S. 924 (1959); *Deal v. Cincinnati Board of Education*, 389 U. S. 847 (1967).

plan has been as stated in *Goss v. Board of Education*, 373 U. S. 683.[13]

The same contention the Plaintiffs make here, *i.e.*, racial mixing is required—was made and rejected in *Bradley v. School Board of City of Richmond*, 345 F. (2) 310 (4th Cir. 1965), *vacated and remanded on other grounds*, 382 U. S. 103 (1965).

A zone system such as Jackson has is educationally sound. It is easy to administer. It is clearly within the discretion of the School Board to establish such a plan; it is not Constitutionally within the province of the Federal Government to determine the best and most efficient means of administering schools and educating children.[14]

This Defendant concludes from the above decisions that there is no Constitutional duty to mix the races in public schools and that this Court in the *Brown* decisions did not so intend. Reference is made to the portion of the Appendix to this brief in which are copied extracts from the discussions between counsel and members of the Court during the argument in the original *Brown* cases (Appen-

---

[13] See also *Kier v. County School Board of Augusta County*, 249 F. Supp. 239, 242 (W. D. Va. 1966), which says that they are "but a corollary of the principle that the Fourteenth Amendment does not prohibit voluntary separation of the races, but only discrimination which forces separation."

[14] *Kelley v. Altheimer Ark. Public School District*, 378 F. (2) 483, 497 (8th Cir. 1967) (discussing costly and inefficient bus system).

As stated in oral argument of *Brown* cases on behalf of United States:

"Mr. Rankin: No. (Laughter) Secondly, I think that this Court does not have the duty or the function to try to determine what is a wise educational policy for each one of the various school districts in the country.

"Justice Jackson: I am with you there."

Page 171 Oral Argument, Vol. 2, Cases 1-5, Oct. Term 1954, April 7-9, 1953.

dix, p. 170b). Justice Reed (pp. 24, 35, 59, 65, 66, 67, 80), Justice Harlan (pp. 31, 32), Justice Clark (pp. 32, 33), Justice Minton (p. 62), Justice Black (pp. 62, 63, 64, 65) and Justice Frankfurter (p. 69) clearly indicate that they are concerned only with the elimination of discrimination and that free choice and lack of compulsion may result in all Negro or all white schools without condemnation.[15]

The fact that separation of races could constitutionally exist even after segregation based on law is removed was clearly recognized by the parties involved in the original *Brown* cases.[16]

The Plaintiffs in their Brief (pp. 25, 26, 27) place considerable emphasis upon the Tenth Circuit decision in *Board of Education of Oklahoma City v. Dowell*, 375 F. (2) 158, 1967. That case is premised altogether upon a finding by the trial court of bad faith on the part of Board of Education. The Court made it plain that it was not undertaking to upset its decision in *Downs v. Board of Education of Kansas City*, 336 F. (2) 988, *cert. den.* 380 U. S. 914 which upheld the neighborhood plan and stated that the Constitution does not require compulsory integration.

---

[15] References to pages are to the original page numbers in the transcribed argument (App. p. 178b et seq.).

[16] Brief of American Veterans Committee in *Brown 2*, pp. 5 and 6 (Appendix 169b).

Brief for the Congress of Industrial Organization (Hon. Arthur Goldberg) pp. 7 and 8 (Appendix 167b).

Brief of the United States in *Brown 2*, pages 12 and 26 (Appendix 166b).

c. JEFFERSON COUNTY.

The only significant authority to be found anywhere which appears to hold that the Fourteenth Amendment requires compulsory integration is the case of *United States v. Jefferson County,* 372 F. (2) 836 (1966) (5th) (*cert den.* 1967 O. T.).

The disarray caused by this decision is reflected at once in the dissents thereto filed by Judges Gewin, Bell, Coleman and Godbold. The opinion has encountered the extraordinary treatment of outright rejection by the Eighth Circuit, *Clark v. Board of Education,* 369 F. (2) 661 (8th Cir. 1966); *rehearing denied* 374 F. (2) 569 (1967); *Jackson v. Marvell School District*—not yet reported—is the latest decision of the Eighth Circuit; and by the Sixth Circuit in this case, the only circuits to date which have considered the *Jefferson County* case.

Approximately fifty prior decisions of the Fifth Circuit were plainly overruled by *Jefferson County.*[17]

The Constitution has not changed. This Court has issued no new decrees on the subject. It can only be considered that the original decisions of the Fifth Circuit were works of deliberation and careful attention. Why, then, *Jefferson County*?[18]

The language of the decision establishes the answer (p. 845):

> "Once again the Court is called upon to review school desegregation plans to determine whether the

---

[17] See for example: (*Avery v. Wichita Falls Ind. School Dist.,* 241 F. (2) 230; *Borders v. Rippy,* 247 F. (2) 268; *Cohen v. Public Housing Adm.,* 257 F. (2) 73; *Boson v. Rippy,* 285 F. (2) 43; *Evers v. Jackson Municipal Separate School Dist.,* 328 F. (2) 408; *Stell v. Savannah-Chatham County Board of Education,* 333 F. (2) 55).

[18] In *Jefferson County* the Court was dealing only with "freedom of choice" plans, and did not consider a desegregation plan based on non-racial geographic zone lines. Page 879.

> plans meet constitutional standards. The distinctive feature of these cases * * * is that they require us to *re-examine school desegregation standards in the light of the Civil Rights Act of 1964 and the Guidelines of the United States Office of Education, Department of Health, Education and Welfare (HEW).*" (Italics supplied.)

It is abundantly plain therefore that prior to *Jefferson County* the Fifth Circuit had been governed by Constitutional requirements alone and the interpretation thereof by this Court.

The only difference, then, using the Court's own words, was that in *Jefferson County* they were called on to *reexamine school desegregation plans (Constitutional questions) in the light of new legislative acts and current executive department directives,* apparently having in mind Section 5 of the Fourteenth Amendment.

The opinion of the Fifth Circuit in *Jefferson County* sets forth one clear indication of the thinking of the Court which caused the Court to reject its own mass of precedent:

> "The United States Constitution, as construed in Brown, *requires* public school systems to integrate students, faculties, facilities and activities." p. 846. (Italics supplied.)

This Defendant is unable to find anything in the Constitution, or the *Brown* decisions, requiring a State to *integrate* its public schools in any manner. The Fifth Circuit is trying to convert into Constitutional language the Plaintiff's phrase of "affirmative duty to disestablish segregation." The Constitution simply does not so state. The English language cannot be sufficiently tortured to transpose a prohibition against denial of equal protection into a positive command to a state to take affirmative action to establish racial balance or mixing in schools.

The Tenth Amendment to the Constitution of the United States stands squarely between the Fifth Circuit and its stated objective of compulsory integration. Education or schools are not mentioned in the Constitution of the United States and therefore, beyond question, are subject matters reserved to the respective States, and expressly denied the Federal Government, by the Tenth Amendment. The Constitution properly inhibits denial of equal protection of the laws. When such denial is removed the Constitution is satisfied. Nowhere does it grant any person or group a right of compulsory association, nor *require* anything in the way of education, nor give to the Federal Government the operation or control of Public Schools. In the absence of such a grant *Jefferson County* must fail.

For the Court in *Jefferson County* to find any help in the Civil Rights Act of 1964 or the 1966 Guidelines of HEW, in considering the Constitutional provisions of the Fourteenth Amendment, it had to be under the provisions of Section 5 of such amendment.[19] It is important to note that the power to "enforce" does not include the power to extend the prohibitions of the Fourteenth Amendment so as to change the meaning of such amendment.

> "This the amendment guarantees but no more. The power of the National Government is limited to the enforcement of this guaranty." *U. S. v. Cruikshank*, 92 U. S. 555, 23 L. Ed. 588.

The prohibitions of the Fourteenth Amendment are directed to State action and not to actions of individuals.

> "It is the restrictions on State Power which Congress is empowered to enforce * * *." *Ex parte Virginia*, 100 U. S. 46, 25 L. Ed. 676; *U. S. v. Patrick*, 54 F. 338.

---

[19] "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."

It is plain that the Plaintiffs in *Jefferson County*, as in this case, were complaining not about State action, they were complaining about the action of the individual members of the class which they claimed to represent. These Plaintiffs are complaining because individual Negro families are not electing to do with their own children those things which are freely available to them. This is not a Constitutional violation, it is the exercise by a free American of a free choice in a matter concerning his own children. A choice or right guaranteed by the Ninth and Fourteenth Amendments to the Constitution of the United States.[20]

The paternalistic attitude of the Plaintiffs in this case, as evidenced by this appeal, is that they know what is best for every single Negro family in these United States and that these families should not have the legal right to make their own determination.

Inasamuch as *Jefferson County* by its own terms is founded on the Civil Rights Act of 1964 and the *Guidelines* (App. p. 188b) of HEW, this Defendant considers itself compelled to treat with both points in this brief, *post*.

Does the Civil Rights Act of 1964 Establish Compulsory Integration as a National Policy?

The fallacy in *Jefferson County* relating to the Court's conclusion therein that the above question should be answered in the affirmative is apparent even to a casual reading of the Act. Not only does the Act not establish a requirement of compulsory integration, the Act contains many clear prohibitions against requiring compulsory

---

[20] AMENDMENT 9.

Rights retained by people.—The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

integration or racial balance. The caption of the Act on this subject is "* * * to prevent *discrimination* in federally assisted programs * * *."

Title II is entitled "Injunctive Relief Against *Discrimination etc.* * * *"

Title III is entitled "*Desegregation* of Public Facilities."

Title IV is entitled "*Desegregation* of Public Education."

In Title IV, Section 401(b) provides as follows:

> " 'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but 'desegregation' shall not mean the assignment of students to public school in order to overcome racial imbalance."

Section 407(a)(1) of this title authorizes suit by the Attorney General for denial of "equal protection of the laws * * *."

(2) authorizes suit if "*denied admission* to or not permitted to continue * * * by reason of race etc."

Section 410 of this section makes very plain that elimination of discrimination is the purpose of the Act and that "denial of admission"—not assignment—because of race is the *discrimination* in point.

> "Nothing in this title shall prohibit classification and *assignment* for reasons other than race, color, religion or national origin."

Under Title VI under the heading "Non-discrimination in Federally Assisted Programs," Section 601 provides:

> "No person in the United States shall, on the ground of face, color or national origin, be excluded

from participation in, be denied the benefits of, or be subjected to *discrimination* under any program or activity receiving Federal financial assistance." (Italics supplied.)

The above quoted and referred to sections are all prohibiting sections, they do not command anything.

The legislative history of this Act makes it abundantly plain that the Civil Rights Act of 1964 was providing a national policy against *discrimination* and nothing more.

The case of *Bell v. School City of Gary, Indiana*, 213 F. Supp. 819 (N. D. Ind.), aff'd, 324 F. 2d 209 (7th Cir., 1963), *cert. den.* 377 U. S. 924 (1964), is of vital importance in construing the Civil Rights Act of 1964. The legislative history makes it clear that Congress was adopting the opinions in this case as a whole, and not just the narrow holding respecting racial imbalance or de facto segregation.[21]

The Civil Rights Act of 1964 was enacted on July 2, 1964. Title IV and Title VI affected the questions determined by the Fifth Circuit in *Jefferson County*. Senator Humphrey of Minnesota (now Vice President of the United States) was the floor manager of the bill in the Senate, assisted by Senator Cooper of Kentucky and Senator Javitts of New York.[22]

---

[21] Senator Humphrey observed (110 Cong. Rec. 12715):

Judge Beamer's opinion in the *Gary* case is significant in this connection. In discussing this case, as we did many times, it was decided to write the thrust of the court's opinion into the proposed substitute.

[22] The following, appearing on page 12715, et seq., of the Congressional Record for June 4, 1964, is significant:

Mr. Humphrey. But I am manager of the Bill and, as a part of the legislative history, that would have some importance. It would not be important because those words came from Senator Humphrey, but it would be important because the Senator from Minnesota is the manager of the bill.

Senator Humphrey clearly spelled out the intent of Congress that actions under Title VI affecting schools are limited by the provisions of the Act affecting schools as follows:

> "Mr. Byrd of West Virginia: Can the Senator from Minnesota assure the Senator from West Virginia that under Title VI School children may not be bused from one end of the community to another end of the community at the taxpayers' expense to relieve so-called racial imbalance in the schools?
>
> Mr. Humphrey: I do.
>
> Mr. Byrd of West Virginia: Will the Senator from Minnesota cite the language in Title VI which would give the Senator from West Virginia such assurance?
>
> Mr. Humphrey: That language is to be found in another title of the bill, in addition to the assurances to be gained from a careful reading of Title VI itself.
>
> Mr. Byrd of West Virginia: In Title IV?
>
> Mr. Humphrey: In *Title IV* of the bill * * *
>
> Mr. Humphrey: Yes. I do not believe in duplicity. *I believe that if we include the language in Title IV, it must apply throughout the act.*"

The words of the Civil Rights Act of 1964 are so clear that it should not be necessary to review the legislative history to determine that Congress did not intend to grant authority to compel integration. However, any misunderstanding is removed by the following legislative history made by Senator Humphrey as the floor manager of the bill in the Senate:

> "Mr. Byrd of West Virginia: Will the Senator from Minnesota read that language in Title IV?
>
> Mr. Humphrey: Yes; I would be more than happy to do so.
>
> The provision merely quotes the substance of a recent court decision, which I have with me, and which I desire to include in the Record today, *the so-*

called Gary case. The language appears on page 21 of the substitute bill beginning on line 18. It refers back to matters of desegregation. The language is as follows:

> Provided, That nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or *otherwise enlarge the existing power of the court to insure compliance with constitutional standards.*

Mr. Byrd of West Virginia: What does the word 'herein' mean?

Mr. Humphrey: It means within the act.

Mr. Byrd of West Virginia: Does it mean the act or the title?

Mr. Humphrey: It means the act.

Mr. Byrd of West Virginia: * * * Cannot the office of Education, pursuant to carrying out this regulation, deny assistance to school districts wherein racial imbalance exists?

Mr. Humphrey: Let me read from the substitute:

> *Provided, That nothing herein shall empower any official or court of the United States to issue any order.*

Mr. Byrd of West Virginia: 'To issue any order,' but does it provide that the Office of Education shall not cut off federal assistance?

Mr. Humphrey: But in order to cut off federal assistance, the President would have to issue the order, if the Senator will read Section 602.

Mr. Byrd of West Virginia: The words are:

> *No such rule, regulation or order shall become effective unless and until approved by the President.*

Mr. Humphrey: That is correct.

Mr. Byrd of West Virginia: What assurance does the Senator give me that the President will not approve such a requirement?

Mr. Humphrey: Because I do not believe the President will violate the law.

* * *

Mr. Byrd of West Virginia: The President would not be violating the law if such a requirement were established with his approval.

Mr. Humphrey: It is already provided in the proposed substitute that—

> Nothing herein shall empower any official or court of the United States to issue any order.

Mr. Byrd of West Virginia: That is correct, but that is in Title IV.

Mr. Humphrey: But it applies to the act.

Mr. Humphrey: * * * Under Title IV and under Title VII (VI) have already indicated to the Senator that the word 'herein' applies to the act—

Mr. Byrd of West Virginia: The Senator from Minnesota has said that:

Mr. Humphrey: But I am manager of the bill, and as a part of the legislative history, that would have some importance * * *."

This legislative history indicates clearly the intent of the proviso to Sec. 407(a) that schools shall not be deemed to have an affirmative duty to effect actual "integration."

Section 602 [23] of Title VI carries a grant of authority

---

[23] This section in full is as follows:

Section 602. "Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provision of Section 601 with respect to such program or activity by issuing rules, regulations or orders of general applicability *which shall be con-*

(Continued on following page)

and a mandatory direction for the agency involved to carry out the provisions thereof so as to be consistent with the *achievement of the objectives of the statute authorizing the financial assistance* in connection with which the action is taken.

The statute dealing with public schools and which "authorizes" the "financial assistance" for such school program is the Elementary and Secondary Education Act of 1965. This is the statute referred to in Section 602.

What, then, are the stated objectives of the Elementary and Secondary Education Act of 1965?

One good indication is to be found in the title: "An Act to Strengthen and Improve Educational Quality and Educational Opportunities in the Nation's Elementary and Secondary Schools."

Section 201 of this act contains an express declaration of policy which is as follows:

> "Sec. 201. In recognition of the special educational needs of children of low-income families and the impact that concentrations of low-income families have on the ability of local educational agencies to support adequate educational programs, the Congress hereby declares it to be the *policy of the United States to provide financial assistance (as set forth in this title) to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means (including preschool programs) which contribute particularly to meeting the special educational needs of educationally deprived children.*" (Italics supplied.)

(Continued from preceding page)

sistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation or order shall become effective unless and until approved by the President." (Italics supplied.)

The above provisions therefore indicate that the Civil Rights Act of 1964 is not a declaration of national policy of *integration*.

In addition thereto a declaration of national policy by the reference contained in Section 602 of the Civil Rights Act of 1964 is that declaration expressly set forth in Section 201 of the Elementary and Secondary Education Act of 1965 i.e. the improvement of the educational programs mentioned in such section.

This defendant submits therefore that there is no national policy commanding integration, that to the contrary there are express prohibitions against any requirement of racial balancing. We also submit that the only national policy applicable to the public schools of the United States is that of improving and enriching educational programs for the Nation's children, especially the underprivileged. Any national policy undertaking to do otherwise with the public schools of this nation would be folly.

The Fifth Circuit simply misconstrued this Act in *Jefferson County*.

The "1966 Guidelines" (App. p. 188b) Violate the Civil Rights Act of 1964 and Are Not Required by the Constitution.

The Guidelines were adopted as the plan of the Court in *Jefferson County*. The Court also stated the Guidelines were one of the basic reasons for its reversal of its former precedents.

The effect of the Fifth Circuit action in adopting the Guidelines as the plan of the Court is to serve as enforcement of the Guidelines (compulsory integration) as a constitutional duty without touching the question of whether or not the Guidelines are legal under the Civil Rights

Act of 1964. We have already treated in this brief the fact that the Constitution does not require compulsory integration.

The Court skirted the issue of legality of the Guidelines by holding that "They are required by the Constitution and, as we construe them, are within the scope of the Civil Rights Act of 1964" (p. 848). Is this Court prepared to say the Constitution requires the provisions of the Guidelines of HEW?

Without considering the legality of the Guidelines, the Court gave sufficient weight thereto to totally reverse itself on a basic constitutional question. This "enforcement" of the Fourteenth Amendment changes the entire meaning of the Amendment. This defendant considers itself compelled to challenge the legality of such Guidelines. It should be remembered that under Section 5 of the Fourteenth Amendment only Congress is granted the right to enforce by legislation the Fourteenth Amendment, not the Commissioner of Education. Thus an administrative regulation of the Commissioner must be legally founded upon an Act of Congress.

What is the *Guidelines* issued by HEW? There are those, including the *Fifth Circuit*, who say the *Guidelines* are simply "statement of policy." *Jefferson County*, p. 857.

If that position be correct, then the *Guidelines* are entitled to no weight at all in a Court in a consideration of a Constitutional question. It is not an order, an executive decree or regulation. It is comparable to a form letter distributed generally for aid in making application for participation in a program.

The HEW Guidelines would fall within the classification of rulings and directives by the Treasury Department and other administrative agencies. Various departments prepare similar directives variously referred to as Solici-

tor's Memoranda, Department Committee Regulations, Advisory Board Memoranda, etc. One of the most recent announcements by this Court of the attitude of the courts toward such rules, directives, or memoranda was made in the case of *U. S. v. Mississippi Chemical Corp.*, 326 F. 2d 569 (5th Cir. 1964) where the Court said:

> "As it is stated in *Helvering v. Edison Brothers Stores*, 133 F. 2d 575: *'The Treasury Department cannot by interpretative regulations, make income of that which is not income within the meaning of the Revenue Acts of Congress.'* Compare the statement of the Supreme Court in *Blatt Co. v. United States*, 305 U. S. 267: *'Treasury regulations can add nothing to income as defined by Congress.'* Treasury Regulations and Treasury Decisions, however, are not involved in the issue for decision here. The taxpayer's position is that the Commissioner cannot, *by solicitor's memoranda, departmental committee recommendations, or rulings, or by his own private rulings in this case,* make taxable income to the cooperative of that which is taxable income to the patron. * * * As a matter of fact and law, administrative practice has no effect upon the determination of what constitutes gross income, except insofar as the *practice is in accord with the rules of law governing that determination.*" [24] (Emphasis added.)

On the other hand, if the *Guidelines* constitute a flat ultimatum to be met under penalty of losing federal funds under Section 601 of the Civil Rights Act of 1964, then the *Guidelines* is a regulation. If it is a regulation it is void as the President of the United States has not approved same as required by Section 602 of the Act. It is likewise void as being contradictory to the language and intent of the Civil Rights Act of 1964.

---

[24] See *United States v. Bennett*, 186 F. (2) 407.

As required by Section 602 of the Civil Rights Act of 1964 HEW prepared what was termed its Regulations and submitted same for the signature of the President.[25] This bland document contained no regulations at all within the meaning of Section 602 but was signed December 3, 1964. Thereafter, under Section 80.4(c) of such approved document the *real* regulations (Guidelines) were issued without the approval of the President of the United States. This is nothing more than a sidestep of a direct Congressional edict. This defendant cannot imagine any other set of circumstances under which such a patent evasion of a Congressional Act would be tolerated by a Federal Court. A "regulation" is that which regulates. The Guidelines clearly do *nothing* but regulate, a district must comply or lose Federal funds. It is clear that the Guidelines is the type regulation which Congress intended to be subject to Presidential approval—by whatever name it may be identified.[26]

In 2 AM. JUR. 2d 168, Sec. 354—*Compliance with statutes*—the following general rule is stated:

> *"The general principles that all powers of an admistrative agency must be exercised in accordance with*

---

[25] 45 CFR, Part 80, 64 FR 12593.

[26] Sec. 602, Title VI—Nondiscrimination in Federally Assisted Programs, Civil Rights Act of 1964, contains the following requirements:

> "Sec. 602. Each Federal Department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of Section 601 with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. *No such rule, regulation, or order shall become effective unless and until approved by the President.*"

the statute or other law conferring such power, and that an agency's jurisdiction or authority to act depends upon compliance *with the statute vesting power in the agency,* apply in relation to procedural provisions laid down in the statutes governing the agency, at least such as are deemed mandatory and involve matters of substance and not mere technicalities. *An attempt to exercise a power without compliance with the provisions as to the manner and circumstances of its exercise is a nullity.* All persons are charged with knowledge of the provisions of statutes and must take note of the procedure adopted by them; when that procedure is not unreasonable or arbitrary, there are no constitutional limitations relieving them from conforming to it."

In *Mahler v. Eby,* 264 U. S. 32, 68 L. ed. 549, 44 S. Ct. 283 (1924), Mr. Chief Justice Taft rendered the opinion of the Court which requires an executive agency to substantially comply with the statutory procedure, saying:

"* * * The defect is jurisdictional. There is no authority given to the Secretary to deport except upon his finding, after a hearing, that the petitioners were undesirable residents. There is no evidence that he made such a finding except what is found in the warrant of deportation. * * *

The finding is made a condition precedent to deportation by the statute. *It is essential that where an executive is exercising delegated legislative power he should substantially comply with all the statutory requirements in its exercise,* and that, if his making a finding is a condition precedent to this act, the fulfilment of that condition should appear in the record of the act. * * *" [27]

---

[27] See *Civil Aeronautics Board v. Delta Airlines, Inc.,* 367 U. S. 316, 6 L. ed. 2d 869, 81 S. Ct. 1611; *Wichita R. & Light Co. v. Public Utilities Commission,* 260 U. S. 48, 67 L. Ed. 124, 43 S. Ct. 51 (1922); *National Labor Relations Board v. Prettyman,* 117 F. (2) 786 (CA 6th 1941).

The Guidelines themselves are nothing more or less than a set of regulations affecting the operation of every phase of school activity and commanding compulsory integration therein. It therefore violates the prohibitions contained in the Civil Rights Act of 1964. Some of the prohibitions violated in the Civil Rights Act of 1964 are Sections 401(b), 604; 701(b); 407(a); 410; 601; 602; 702; 703(j). Some of the sections of the Guidelines which violate the Act are 181.11; 181.14; 181.54; 181.43; 181.45; 181.49; 181.51.

It is not contended that the Fifth Circuit in *Jefferson County* could not adopt any plan it chose *consistent with the Constitution,* the same as other Courts do in these school cases. The point is that in *Jefferson County* the Court *started* with the Guidelines as the very basis for overruling its prior decisions, finding the Guidelines to be *constitutionally* required and *commanded* by the Civil Rights Act of 1964 as a part of a national policy of integration. The entire basis for *Jefferson County* falls if such Guidelines are not constitutionally required and the Civil Rights Act of 1964 is not a declaration of national policy of integration as outlined above.

This defendant submits that if the Court reaches this question in its determination of this case the Guidelines should be declared invalid.

It is apparent that the Fifth Circuit in *Jefferson County* has been misled in the application of the provisions of the Civil Rights Act of 1964 and the Guidelines of HEW.

d. IS THE CONSTITUTION SUBJECT TO REGIONAL APPLICATION?

The Plaintiffs have conceived the rationale that the alleged Constitutional command of *integration* applies *only* to States which had a current segregation statute prior to *Brown* (de jure segregation)—the South—and does not apply to those States which did not have a current segregation statute at the time of *Brown* (de facto segregation). The Fifth Circuit seemingly agreed to this double standard of law in *Jefferson County*.

How do Plaintiffs draw the line on States having segregation statutes on the books at the exact time of *Brown*? This Court could not say in *Brown* at exactly what point in time segregation became unconstitutional, apparently the development of the art of psychology was related in some way to such point in time. All States had segregation statutes to some extent at one time or another. Kansas had a segregation statute under which Topeka was operating in the original *Brown* case and the Court made no distinction there. Until 1949 Indiana had such a statute. See *Bell v. Gary*, 213 F. Supp. 822. In *Tina Deal v. Cincinnati* (6th Circuit) 369 F. (2) 55 *Cert. den.* OT 1967 where racial *separation* is admitted but justified on the premise that neighborhood school zoning simply includes only Negro children because of racial housing patterns (de facto segregation) the State of Ohio had a segregation statute until just prior to *Plessy v. Ferguson*, 163 U. S. 537. Who is to say that such statute did not lay the ground work for present day de facto segregation?

Finally, the *Jefferson County* decision avoids the question of de facto segregation by saying:

> "The neighborhood school system is rooted deeply in American culture. Whether its continued use is

> constitutional when it leads to grossly imbalanced schools is a question some day to be answered by the Supreme Court, but that question is not present in any of the cases before this Court." [28] (p. 879.)

Is this Country ready for a federal system of regional law? Is one State to be judicially declared a "good" state and the other a "bad" state? Are States which today are lawfully carrying on their affairs to be punished tomorrow if this Court declares a new concept of Constitutional law thereby invalidating such State action? We think Mr. Justice Thurgood Marshall expressed the proposition about as well as it can be expressed in argument to this Court while serving as counsel for the plaintiffs in the original *Brown* case wherein he stated:

> "The next point I want to make on the general side is what I made before, and that is the need for uniform application of our Constitution and all of its provisions throughout the Country so that freedom of the press won't mean one thing in one State and another thing in another state, so that all of these rights in the Constitution—It has never been said on any other right that I know of that special exceptions should be made as to one state or the other." [29]

We concur with Mr. Justice Marshall on that point.

The theory that the "South" must pay its price for having, pursuant to what was then recognized without question as the law of the land, segregated the races in its

---

[28] See *Henry v. Clarksdale Mun. Sep. Sch. Dist.* (No. 23,255) in Fifth Circuit, Argued May 24, 1966, Not decided. Reported only in Race Relations Law Reporter, Vol. II, No. 2, Summer 1966, p. 719.

[29] P. 124, Vol. III, Oral Arguments, Cases No. 1-5 before the Supreme Court of the United States, October term 1954, April 11-14, 1955.

schools has been expressly rejected by the Sixth Circuit in this case.[30]

Dr. James Bryant Conant in *Slums and Suburbs* has a more fair-minded approach to the question when he says:

> "As I read the history of the United States, this Republic was born with a congenital defect—Negro slavery." (App. p. 112b.)

According to Dr. Conant this defect was allowed, as a National Policy, to continue after the Civil War.

> *"The present situation is a consequence of a National Policy, or rather the lack of a National Education Policy, which has persisted for generations."* (App. p. 115b.)

This lack of a National Education Policy has now been cured by the adoption of the Elementary and Secondary Education Act of 1965.

Dr. Conant's evaluation of the current problem is far more reasonable than that presented by the finger-pointing approach. The distinction between "de jure" segregation and "de facto" segregation begs the question. It is unworthy of the federal judiciary.

---

[30] The Court said in its opinion:

"*However ugly and evil the biracial school systems appear in contemporary thinking, they were, as Jefferson, supra, concedes, de jure and were once found lawful in Plessy v. Ferguson*, 163 U. S. 537 (1896), *and such was the law for 58 years thereafter. To apply a disparate rule because these early systems are now forbidden by Brown would be in the nature of imposing a judicial Bill of Attainder. Such proscriptions are forbidden to the legislatures of the states and the nation*—U. S. Const. Art. I, Section 9, Clause 3 and Section 10, Clause 1. *Neither, in our view, would such decrees comport with our current views of equal treatment before the law.*" (p. 958.)

e. COMPULSORY INTEGRATION IS EDUCATIONALLY DAMAGING TO UNDERPRIVILEGED GROUPS AND TO SCHOOL SYSTEMS GENERALLY.

Foreword.

A professional biography of the author of each work cited hereafter appears before such work in the Appendix to this brief.

The 1954 decisions of this Court in the *Brown* cases centered the efforts of many groups on public schools, seeking to use schools as a pry-pole for all kinds of community social changes.

There are those in this country who believe the Federal courts should issue a sweeping all-inclusive order requiring racial balance in the schools of this country. Racial balance is what the Plaintiffs want here, however they shy away from seeking such an order applying anywhere except in the South. In this brief this defendant has already stated the belief that such an order is not legally justifiable.

But what is the actual effect of such an order on our schools—whether nationwide or in the South?

This Defendant believes the only reason for the existence of the public schools in our country is to educate *all* of our children to the greatest extent possible. Our schools are not cure-alls for social problems. That is not to say that cures for such problems ought not be sought, it is a simple proposition that such is not the problem of the schools. There is highly competent authority to back up this position. The official position of the National Education Association on this question is as follows:

> "*Educational considerations should be primary in the schools.* The questions which arise from efforts to eliminate de facto segregation deeply involve public

> passions pro and con, thereby complicating the search for solutions that the public will tolerate. This search must be illuminated by the understanding that the purpose of schools is education and that no child is being served if education is being made impossible. School authorities must make clear when they believe that pupils are being used as pawns in the struggles of adults. The question to be asked about all proposals is whether they will improve the education of the pupils involved, not whether they will contribute to other goals, even desegregation." [31]

On the other hand, there are many *symptoms* of such ills which are apparent within our schools, such as children from broken families, from different racial background, of uneducated parents, and children from depressed areas who present special problems in the schools. These problems are educational in nature and must properly be attacked on an educational basis within the framework of the school itself.

The pure sociologist, as distinguished from those with educational background, and other allied groups see nothing but the basic social illness and charge helter-skelter in pursuit of a cure. If legal rights of others be trampled in the process, then that is unfortunate. If education be damaged, that is a price he's willing to pay. If States rights reserved under the Tenth Amendment to the Constitution be overwhelmed, that concerns him not at all.

The causes of social problems are widespread, they have been a century or more in creation in this country, they will be here a century from now. As stated by Solicitor General Sobeloff in Brief of United States (page 7) in *Brown* 2:

---

[31] *De facto Segregation* from *American Education and Search for Equal Opportunity*, official publication of the National Education Association (App. p. 158b).

"It must be recognized that racial segregation in public schools is not a separate and distinct phenomenon. It is part of a larger social pattern of racial relationships. The Court's decision in these cases has outlawed a social institution which has existed for a long time in many areas throughout the country—an institution, it may be noted, which during its existence not only has had the sanction of decisions of this Court but has been fervently supported by great numbers of people as justifiable on legal and moral grounds."

A pure sociologist should never be confused with an educator.[32]

This group of pure sociologists is referred to by A. Harry Passow as "behavioral and social scientist" while those with "immediate and direct responsibility for operating (school) programs effectively from day to day" are collectively called by him "school people." [33]

There seems to be a consensus expressed by Dr. Passow that the proper attack on the basic illness is a communitywide attack on the basic causes while the schools have the job of concentrating on preventive and compensatory efforts. Compulsory integration or racial balancing is not seen as the answer, but rather enrichment of the educational effort.[34]

---

[32] In the *Jefferson County* decision the Fifth Circuit failed to make this distinction in its consideration of the Guidelines. The Court stated in this case that the Guidelines were "prepared and formulated by educational authorities" and further "are prepared in detail by experts in education and school administration." A reading of the Guidelines reflects that such document is related to education only in the sense that it applies to schools. Further, the document speaks for itself that it is in fact a directive or regulation with one objective, compulsory integration of schools. The author is not named, but obviously the Guidelines is the work of those sociologically oriented.

[33] *Education in Depressed Areas* (App. 1b).

[34] See page 47 for footnote 34.

The use of the neighborhood school is strongly supported by Prof. Robert E. Mason in his *"A Theory for Urban Education"* (App. p. 141b). Rather than urging the moving of pupils for such purposes as racial balance, it is seen as better to keep children in their own neighborhood where they can be reached by all social agencies working for the betterment of the neighborhood. Likewise is the view of Dr. Archibald B. Shaw who says in *"The Neighborhood School"* (App. 28b):

> "To one view, the scrambling of kids by some impossible formula destroys the potential of the neighborhood school for every neighborhood and doesn't yield genuine gain for anyone. To such a view, neighborhoods and their sociology are all that stand between us and a mass, de-humanized, overpowering society."
>
> "The problem is with us, in cities large and small; all over the nation. Destroying the neighborhood school is not the answer. What is needed is the will and wisdom, to mount a concerted attack on the deficiencies of the neighborhoods and to make drastic improvements in the appropriateness and effectiveness of their schools." [35]

Reference is made to an opinion poll published in *"The Nation's Schools,"* under the direction of its editor Robert M. Cunningham. Of school administrators sampled, ninety-one per cent were opposed to transporting

---

[34] Lincoln School in the City of Jackson is a typical example of enrichment efforts in schools serving those areas considered depressed. Since Title I funds have been available, in this school alone approximately $53,290.00 in such funds have been spent in enriching the Educational Program of this school in new equipment, and in new teachers. In addition to the new equipment, the teacher-pupil ratio has been reduced to 1:25 as compared to 1:31 in 1965-66. Report to Title I Division, Tennessee State Department of Education.

[35] See also *"Assimilation in American Life"* (App. 33b).

students to eliminate de facto segregation (App. p. 31b). Eighty-four per cent approved the neighborhood concept.

The requirement of racial balance militates against the educational development of the underprivileged child,[36]

No less an authority in education than Dr. James Bryant Conant agrees that compulsory integration serves no purpose, educationally or otherwise.[37]

As a practical matter, and somewhere along the line the decision in this case will have to be applied educationally, an order of this Court requiring compulsory integration or racial balancing in Jackson Schools, whether stated affirmatively or simply backed into by requiring a similar result on the semantics of a positive requirement of negative action, will produce immediate and vast repercussions on the Jackson School System.

A glance at the map (Ex. 11) will show that Lincoln, Washington-Douglass and South Jackson Schools are in the center of Negro neighborhoods. The attempt to legally compel white children to attend those schools will produce one immediate result, the white people will leave, to private schools or anywhere else available to them.[38]

The Court can simply look out of the window at the

---

[36] See *"Desegration Creates Problems, Too,"* by I. N. Berlin (App. p. 65b) and *"Educational Problems of Segregation and Desegregation,"* by John H. Fischer (App. p. 71b).
"The Goals of Integration" by Oscar Handlin (App. p. 82b).

[37] *"Slums and Suburbs"* (App. p. 105b).

[38] The Jackson, Tennessee Housing Authority was required beginning July 1966 to compulsorily integrate the Projects under its control.
In July 1966, there were 845 units occupied by 435 Negro families and 410 white families on a segregated basis. Today the occupancy is 570 Negro families and 257 white families.
White applicants have dropped to near zero. The whites remaining are mostly very elderly or otherwise handicapped who are unable to leave.

Washington, D. C. schools to see what happens when desegregation places white students in predominantly Negro schools or forced integration occurs—where are the white students in Washington, D. C. schools? [39]

If the experience in Jackson, Tennessee should prove to be similar to the experience of Washington, D. C. and every other major urban area in the United States where compulsory integration has been applied, Jackson can look forward to abandoning *at least* three modern schools with a reasonable value of four million dollars.

Jackson does not believe it can compel or otherwise force integration of those schools named. There is no real way out of this dilemma. Even the replacement of the schools in border areas with new schools will produce such a high percentage of mixing that the exodus will continue. The replacement of those abandoned schools with schools in border areas will cost approximately eight million dollars which Jackson does not have. So the City of Jackson, Tennessee would be required to assume a twelve million dollar loss—in modern schools it can't use and in new

---

[39]State and city	Total elementary students	Total white students in elementary schools: Number	Total white students in elementary schools: Percent of total elementary students	Total Negro students in elementary schools: Number	Total Negro students in elementary schools: Percent of total elementary students	Negro students in schools 90 to 100 percent Negro: Number	Negro students in schools 90 to 100 percent Negro: Percent of total Negro elementary students
District of Columbia—							
Washington:							
1965-66	91,994	8,308	9.0	83,686	90.9	75,688	90.4
1960-61	80,279	13,498	16.8	66,781	83.2	55,806	83.6
1955-56	67,384	22,415	33.3	44,969	66.7	33,055	73.5
1950-51	59,398	28,527	48.0	30,871	52.0	30,871	100.0

1966-67; 1967-68 not available

Racial Population in the Public Schools, a Report of the United States Commission on Civil Rights 1967, Table A.3, page 12 Appendices.

schools it doesn't need—for what purpose? To try and provide an integrated education to its Negro students—something that is available right now, and has been for over two years, to every single Negro student in the City of Jackson who desires it.

The argument can be made that all white children cannot afford private schools and that is true. The poverty area white and the underprivileged white—the Negro has no monopoly in these fields—will remain and there will then be created an integrated school composed of all classes of Negroes and a few underprivileged whites.

For the moment let's leave the Court house and enter the school house. When we leave the Court house the class action stops. When the school house is entered, the children become individuals. *There is no educational area in which sweeping generalizations can be applied to every student.* Each student is a special case, what is helpful for one student is harmful to the next. Some need firmness, some react badly to firmness, and so on. There are three words which are absolutely essential to the achievement of an effective education program—the words are *"For this child."* School administrators grade on the basis of these three words—they assign work based on what is normal "for this child," they accelerate or slow down progress determined by what is good "for this child." Those three words control all educational processes related to the individual child. There is no other way to deal with the individual child.

It is therefore completely reasonable to measure the implications of compulsory assignment of children, for such purposes as attaining racial mixing, by the same criteria. The parents of the Negro children in the Jackson School System each year make such a determination as to what is good for their own child. Is it to be considered that

the parents lack the will or the intelligence to select wisely for their own children just because they are of the Negro race? Such a conclusion would be a gratuitous insult to the Negro Americans everywhere. It also is abundantly plain that while an integrated education may be desirable for one child it may be totally damaging to the next. Each child is, and must be handled, as an individual, no sweeping order will change that fact. Without doubt, compulsory integration will act both ways. Some may be helped, many will be damaged.

Efforts have been made to offer every student in the school system at Jackson the non-discriminatory right to obtain a desegregated education, free and unfettered by discriminatory laws or discriminatory administration.

Plaintiffs' objection, however, is that *all* Negro students are not attending school with *some* white pupils. This case clearly demonstrates that just as some white pupils do not desire to attend school as a small minority at a predominantly Negro school, almost as many Negro pupils—in fact more Negro pupils on a percentage basis—desire to attend school with members of their own race. Consider the following categories:

A. All Negro pupils who sought transfers to a predominantly white school from the predominantly Negro school serving the neighborhood in which they live received such transfer.

B. All Negro students who sought transfers to a predominantly Negro school, though they were zoned to a predominantly white school serving their neighborhood, received such transfer.

C. All white pupils who sought transfers from the predominantly Negro school serving their neighborhood to a predominantly white school received such transfer

D. No white pupils sought transfer out of their predominantly white school serving the zone in which they live to a predominantly Negro school.

Let us now discuss each of the above categories in the light of the relief which plaintiffs and amicus curiae United States seek. That relief includes the elimination of the free transfer provision so that all assignments will be rigid and inflexible.

As a preface to such discussion, it is noted that the transfer right is termed a "free transfer" and there is perhaps no word in the English language so respected by the Courts as "free" and "freedom." As long as the desegregation process is tempered with freedom, it will succeed. Once freedom is removed, this process stands at the threshold of failure.

A. Negro Pupils Transferring For a Desegregated Education.

This first group; namely, those Negro pupils who exercise the privilege granted to them to obtain a desegregated education by virtue of the free transfer policy will be the victims of the elimination of such policy. The Jackson School System under its free transfer policy grants these children the right to obtain an integrated education. If Plaintiffs and amicus curiae succeed in persuading the Court that the free transfer policy is but a subterfuge to preserve segregation, thus should be declared unconstitutional, then these students and many tens of thousands of such students similarly situated throughout the South will be denied the right to attend school with children of another race.

B. Negro Students Seeking Transfer to a Predominantly Negro School.

The fact that all Negro pupils who applied were granted transfer to a predominantly white school is fairly clear evidence that the free transfer provision is administered fairly by the school system. What, then, is the explanation that these Negro pupils who were assigned to predominantly white schools sought transfer to a predominantly Negro school? Certainly it is not coercion by the white community since the number of transfers by Negroes to a white school has grown rapidly in the three years that this plan has been in effect. Plaintiffs do not even contend there is coercion.

This circumstance can best be explained on the basis that the parents of these pupils feel that their children will obtain a better education in a school with members of their own race.

Plaintiffs and amicus curiae would have this Court deny the pupils and their parents this right. They would have the Court render an opinion that would compel these pupils to remain in the predominantly white school to which they had been assigned. It makes no difference to Plaintiffs whether the children are happy or whether the parents feel that their children are obtaining the best education possible. That is not the issue so far as Plaintiffs are concerned. The cure to all ills, they say, is compulsory integration for these children while denying to those Negro children described as Class A the right to obtain an integrated education. No single factor could be more educationally and emotionally detrimental to these children than to compel them to attend a school where they are dissatisfied with either educational conditions or their environment. As this Court knows, one of the great problems in education is the dropout and this problem will be

multiplied if compulsory attendance is required on some constitutional ground. The dropout of one or thirty of these Negro pupils would do far greater damage to this country than the fact that a few white people might escape for a short period of time the requirement that they attend the predominantly Negro school serving their neighborhood.

C. White Pupils Transferring From the Predominantly Negro School.

In the two sections immediately above, we have seen that all Negro pupils have been granted transfers in the Jackson School System to the school of their choice. White pupils have been accorded this same privilege under the free transfer policy and we respectfully submit that these are the pupils whom plaintiffs and amicus curiae seek to restrict in their attack on the free transfer policy. As we have stated in an earlier section of this brief, unless you accord to the white community the freedom assured them by the free transfer policy, you can have only one result—the flight to the suburbs. Plaintiffs' objective, therefore, would be a fleeting victory—a victory that lasted only long enough for those whites who were in a predominantly Negro zone to locate their residence elsewhere.

Faculty.

While faculty presumably is not before this Court in view of the Sixth Circuit remand to the District Court, the implications of a compulsory integration order of this Court directly relates to faculty. If the Court orders compulsory integration of the system, it should be borne in mind that there is one vast difference between students and faculty. Compulsory attendance laws can herd under-

privileged students around and compel such students to remain where assigned. What law is there to compel the faculty member to stay where assigned if such assignment is personally unacceptable to such teacher? This is an area in which incalculable educational damage resides.

Jackson's problem would be great, but perhaps small when compared to the problems of this type which would exist in the large cities of the North and East, and in other areas of the Country where the white population is equalled or surpassed by the Negro population. In the large cities all-Negro schools exist everywhere.[40]

---

[40] The following information is compiled from reports filed with the Office of Education, H. E. W., 1967.

Cincinnati, Ohio

Total number of schools 104

Schools with all-white student enrollment	6	Schools with all-Negro student body	1
Schools with virtually all-white student enrollment (from 1 to 4 Negroes in each school)	14	Schools with virtually all-Negro student body (from 1 to 4 white students in each school)	6
Schools with all-white teachers (Includes one school with all-white student body)	3	Schools with all-Negro teachers (all with some white students)	3

[The United States Office of Education advised similar information for the District of Columbia, New York City, Chicago, Gary, Detroit and St. Louis was not available "either because it has not been received or has not been processed by the National Center for Educational Statistics O. E."]

Reference is therefore made to a report of the United States Commission on Civil Rights 1967 entitled *Racial Population in the Public Schools* (p. 3) for the latest (1965) available information:

"Racial concentration also is severe within the central cities. Table 1 (p. 4) shows the extent of elementary school segregation in seventy-five cities. In these cities 75% of the

(Continued on following page)

If the existence of a school with exclusive Negro enrollment, not the result of discrimination, is constitution-

---

(Continued from preceding page)

Negro students are in elementary schools with enrollments that are nearly all-Negro (90% or more Negro), while 83% of the white students are in nearly all-white schools. Nearly (p. 5) 9 of every 10 Negro elementary students attend majority-Negro schools. The high degree of racial separation in the schools shown by these national figures is found in the North as well as in the Southern and border States. In Buffalo, New York, for example, 77% of the Negro elementary school children attend schools that are more than 90% Negro (p. 6) while 81% of the whites are in nearly all-white schools (90% or more white). In Gary, Indiana, the figures are 90% and 76% respectively. Again, in the North the proportion of Negro children in majority-Negro schools often equals or exceeds the national average. In Flint, Michigan, 86% of the Negro elementary school children are in majority-Negro schools; in Milwaukee, 87%; in Chicago, 97%.

A high degree of racial separation of Negro students frequently prevails regardless of the size of the school system. Examples from Northern and border state school systems are illustrative. Kansas City, Missouri has an elementary school enrollment twice as large as Fort Wayne, Indiana, yet in each city more than 60% of the Negro children are in nearly all-Negro schools. Detroit, Michigan has an elementary school enrollment almost four times as large as Newark, New Jersey, yet in each city more than 90% of the Negro children are in majority-Negro schools."

This report also indicates a similar situation as to teachers in the Negro schools.

"(footnote 32 on page 7 of the Report) A similar racial pattern exists for teachers. In Chester, Pennsylvania 101 of the 112 Negro elementary school teachers in the school system in 1965 taught in schools that were 90 to 100% Negro. In Buffalo, New York of the total of same 200 Negro elementary school teachers, 80% taught in 90 to 100% Negro schools in 1965. In Indianapolis, Philadelphia and Chicago, more than 90% of the Negro elementary school teachers taught in majority-Negro schools in 1965. In border state school systems an even greater proportion of Negro teachers are found in nearly all-Negro schools. In Baltimore, for example, more than 85% of the more than 2,000 Negro elementary school teachers taught in schools that were 90 to 100% (p. 8) Negro in 1965. In St. Louis, all but 73 of the nearly 1500 Negro elementary school teachers taught in 90 to 100% Negro schools in 1965."

ally wrong in Jackson, Tennessee, it is constitutionally wrong everywhere. To hold otherwise would be to deny separated Negro students in other areas of the Country equal protection under the Fourteenth Amendment. The transportation of students in the city areas to acquire racial balance or mixing in schools will perhaps be more traumatic than in other areas of the Country. The most demanding need now is for greater monetary support to upgrade and enrich education, especially in depressed areas. The loss of funds for basic education diverted to attain a racial balance will be nothing short of tragic.[41]

V.

CONCLUSION.

It is clear that this Court in the *Brown* cases has condemned *"discrimination"* based on race. It is likewise abundantly plain that this Court said nothing more.

Defendant submits that the Jackson, Tennessee School System is operating free of racial *"discrimination."* Naturally the question of faculty has yet to be resolved in accordance with the remand of the United States Court of Appeals (6th) but whatever may be the outcome of such proceeding, it goes without saying this Defendant will comply with it.

Then why all the confusion about what this Court did or did not do?

First of all, a Court decision opening a new field of law is considered Pandora's Box by special interest groups. This continues until the Court convinces all concerned that it had the ability to and did say what was meant to be said and all that was meant to be said.

---

[41] See article by Jim Hampton on Chicago problem (App. p. 134b).

The real Plaintiff in this case simply wants more now than at the time the case was decided. If they succeed in this case, they will be back tomorrow for more. There is also a great temptation for those in the political arena to try to capitalize in this field by speculating on what the Court "really" meant, notwithstanding the full ability of this Court to express what it meant. This speculation is reflected in the action of some agencies active in this field. It also serves to give unjustified support to national groups such as the actual Plaintiff in this case, as distinguished from the nominal plaintiffs named in this proceeding, to seek more and more and to sue and sue.

All that is needed to bring order out of beginning chaos is the simple statement from this Court that it affirms the action in this case of the United States Court of Appeals for the Sixth Circuit. This will clear the air everywhere and end the multiplicity of suits filed and being filed in hope of what this Court will some day say.

This Defendant respectfully urges this Court to take the opportunity offered by this appeal to firmly and uncompromisingly return the public schools of this nation to the control of professional educators. For too long our schools have been buffeted by the sociologist, the ethnologist, the politician, the welfare worker and the reformer. No disrespect is intended to any group classified above who no doubt are well intentioned in their own field, but the schools should not be their crucible. The 1954 decision of this Court has been accepted just about everywhere as it should be. It certainly has in Jackson. Our schools need now to be allowed to get on with their job, to be removed from the combat arena of Civil Rights, poverty and similar social disturbances.

A careful reading of the Plaintiffs' brief in this case—and now the Amicus Curiae brief of the United States—

reveals rather plainly that neither party really seriously contends this Court commanded compulsory integration in *Brown* or that racial mixing was required by those decisions.

Neither party denies that a very substantial amount of desegregation has been accomplished in Jackson, Tennessee. There is no contention at all about discrimination. There is no really serious contention about gerrymandering of zones, being simply referred to in passing.

Both parties point to the existence of some all-Negro schools but neither has been able to point to any factor as causing the all-Negro schools except the fact the schools are there because every single Negro student therein chose to be there—by the exercise of an absolutely free choice.

These parties are here seeking to have this Court *re-interpret* the Constitution of the United States—or find a means to justify the end result they seek. This Court in *Brown* has already carefully and concisely interpreted the Constitution of the United States on this very question. As an earlier generation waited from Saturday to Saturday to see how Pauline would fare, so these parties seek to have this Court serialize Constitutional interpretations.

The rock on which this Nation is founded is the Constitution. This approach to the Constitution will change rock to sand.

The City of Jackson, Tennessee is operating its School System in a Constitutional manner within the meaning of the decision of this Court in *Brown* and, therefore, this Defendant prays:

1. That the decision of the United States Court of Appeals for the Sixth Circuit in this cause be affirmed.

Respectfully submitted,

RUSSELL RICE, SR.,
Attorney for Respondents.